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SPECIAL EDITION

The Anglo-American LAWYER

THE HON. MICHAEL KIRBY AC CMG

HON. MICHAEL KIRBY
ON AUSTRALIAN CONSTITUTIONALISM

HON. RICHARD GOLDSTONE
ON THE SOUTH AFRICAN CONSTITUTION AND INTERNATIONAL LAW.

PROF. SIR JOHN H. BAKER QC., LLD(CANTAB.), FBA
ON THE HISTORY OF THE LAWS OF ENGLAND.

SPECIAL REPORT
ON THE DOCTRINE OF DUTY OF CARE

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EDITORIAL

This Special Edition features **Hon Michael Kirby AC CMG**, former Justice of the High Court of Australia. We thought we should pay a living tribute to Justice Kirby for his huge contribution to the legal scholarship. Since his retirement, he has delivered many lectures and speeches expounding the law. We believe that writing tributes when one's is gone forever does not make much sense; we must honor the person when he is alive. Justice Kirby deserves that honor. He is still active and travels a lot as he gets invitations from around the world. He has spent several decades articulating and elucidating the law which is an essential quality in a true democracy where freedom of expression abounds. Australia provides such a unique place for articulating ones thoughts freely because Australia is a benchmark for a state that promotes freedom of expression. This phenomenon is not seen in other countries, especially in the 'Global South'. Dispensing justice is a serious business and the Judiciary of any country must have the capacity, resources and trained legal professionals who are able to make such informed judgments. Michael Kirby provides a huge corpus of legal literature for any legal professional serious about understanding the law and jurisprudence. He has also published several books.

Michael Kirby is known in judicial circles as being a Great Australian Dissenter but he describes dissent as being an inbuilt safety mechanism to deter uncritical pursuit of majoritarian opinions that might turn out to be inapposite or unrealistic. He says in our interview with him that 'those who prefer preserving the right to dissent point out that it encourages honesty and truthfulness. Judges in final courts are not performing their duties 'on automatic pilot'. What he posits is that Judges cannot be uncritical of the serious legal issues brought before them, after all litigants are usually pursing justice for their problems. We trust the readers will find a wealth of judicial reasoning by Michael Kirby that would perforce be of great value to Anglo-American legal practitioners.

We had the honor of interviewing **Professor Emeritus Sir John Baker, QC LLD Cantab FBA**, and the Editor of the *Oxford History of Laws of England*. He had provided an overview of historical research of his seminal work on the History of the Laws of England. This would be of immense benefit to any one serious about delving deep into the contours of how the common law was developed over the centuries.

We have also had the honor of interviewing **Hon. Richard Goldstone**, a former Justice of the South African Constitutional Court and former Chief Prosecutor of the United Nations International Criminal Tribunals for the former Yugoslavia and Rwanda. He had given a very wide perspective on his role as judge during apartheid era in South Africa, development of post-crisis South African Constitution and the constitutionalism. He has also articulated his position on the state responsibility of upholding the principle of 'universal jurisdiction'.

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The Anglo-American LAWYER MAGAZINE

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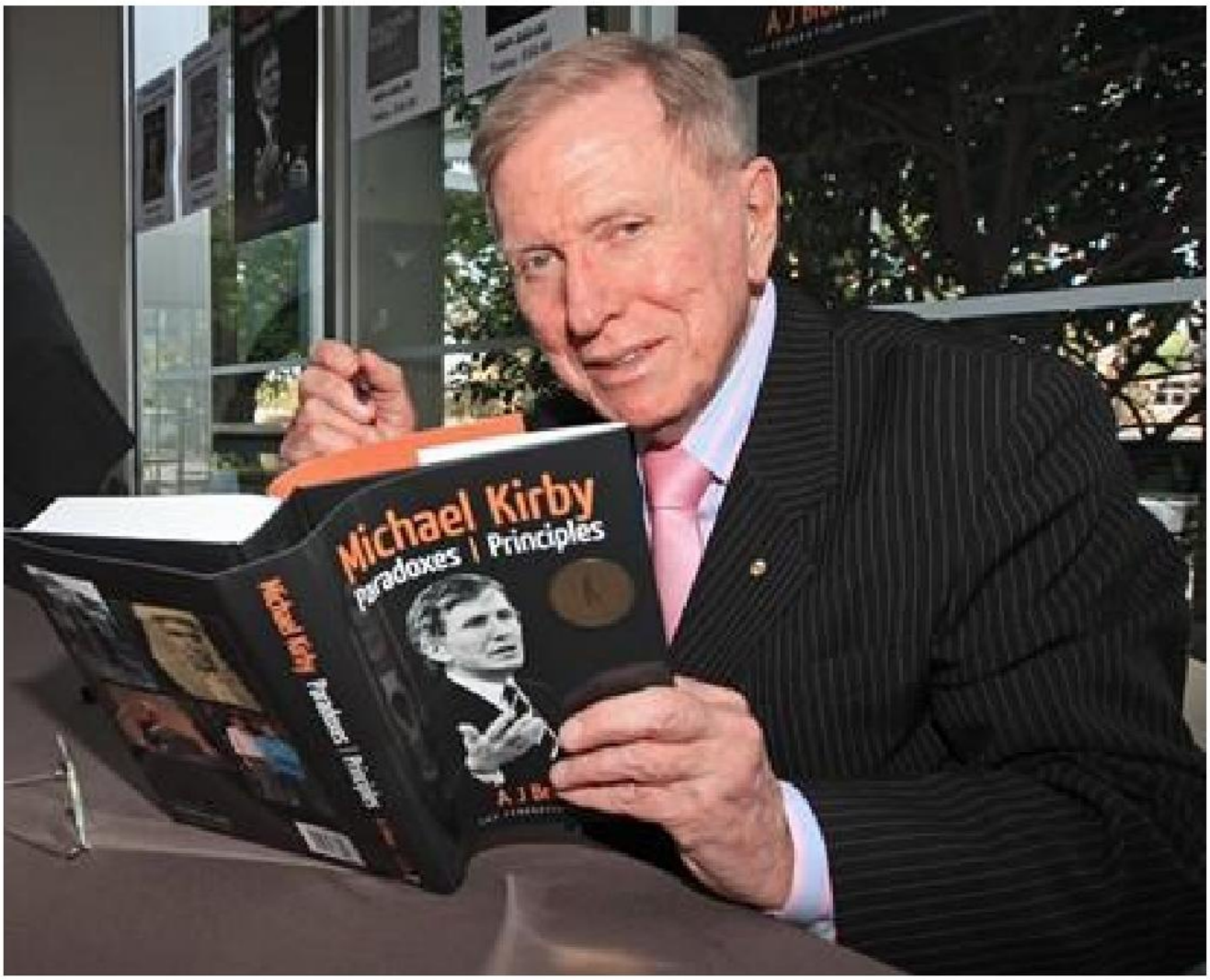
INTERVIEW – THE HON. MICHAEL KIRBY AC CMG ON AUSTRALIAN CONSTITUTIONALISM



Michael Kirby is an international jurist, educator and former judge. He served as a Deputy President of the Australian Conciliation and Arbitration Commission (1975-83); Chairman of the Australian Law Reform Commission (1975-84); Judge of the Federal Court of Australia (1983-4); President of the New South Wales Court of Appeal (1984-96); President of the Court of Appeal of Solomon Islands (1995-96) and Justice of the High Court of Australia (1996-2009).He has undertaken many international activities for the United Nations, the Commonwealth Secretariat, the OECD and the Global Fund Against AIDS, Tuberculosis and Malaria. He has also worked in civil society, being elected President of the International Commission of Jurists (1995-8). His recent international activities have included member of the Eminent Persons Commonwealth of Nations (2010-11); Commissioner of the UNDP Global Commission on HIV and the Law (2011-12); Chairman of the UN Commission of Inquiry on DPRK (North Korea) (2013-14); and Member of the UN Secretary-General's High Level Panel on Access to Essential Healthcare (2015-16). He is also heavily engaged in international arbitrations; domestic mediations; and teaching law. He is Honorary Professor at 12 Australian and overseas universities. In 1991 he was awarded the Australian Human Rights Medal. In 1998, he was named Laurette of the UNESCO Prize for Human Rights Education. In 2010 he was named co-winner of the Gruber Justice Prize. In 2011 he received the inaugural Australian Privacy Medal. The honorary degrees of Doctor of Letters, Doctor of Laws and Doctor of the University have

been conferred on him by universities in Australia and overseas. He lives in Sydney with his partner since 1969, Johan van Vloten.

The AAL Magazine: Honorable Sir, Justice Kirby, We are truly honored to have an opportunity to carry an interview with you in our Magazine. You made an invaluable contribution to the legal scholarship and you do not heed a fresh introduction as you are well known the world over. I think it is about time your academic works were bound together and made a series of volumes whilst you are still with us. We thought we should give you 'a living tribute' for the services rendered by you for the humanity. You have been the longest serving Judge of the highest court of Australia. You have been granted several honorary degrees by a number of Universities in recognition of your contribution to law and jurisprudence, perhaps a world record by an Australian who had scored the highest number of honorary degrees. If I may begin this interview, may I ask Sir, what drove you to choose law and what was your experience reading law, understanding law, arguing and engaged in advocacy, delving deep in to the philosophy of law and finally dispensing justice from the bench of the Supreme Court of Australia. This is no doubt a long journey spanning several decades; you might require an equally long time to answer this question - if I may say so in a lighter vein.

Hon. Michael Kirby: I received an excellent school education at public schools in Sydney, Australia. Public schools educate two thirds of Australia's school children. They teach civic values of democracy; rule of law; and scholarship. Their foundation is expressed in colonial legislation of 1870. Public education is 'free, secular and compulsory'. I won scholarships that provided free university study in faculties of Arts, Law and Economics at the University of Sydney. At the Sydney Law School in 1960 I was taught jurisprudence (legal values) by a great scholar, Professor Julius Stone. He was a legal realist. He taught that the law must be constantly changing and reforming to meet the problems of changing times. He taught that judges' values inevitably affect their decisions. They should be acknowledged and justified rather than hidden in a mythology that judge-made law was always totally 'objective'.

The AAL Magazine: Sir you are known to have made a lot of dissenting judicial opinions and have earned the nickname 'Australian Great Dissenter'. Do you have a contrary view on this or was it that your considered opinion was seen as being a dissenting view even though you have articulated your position but that was perceived to be a 'dissenting view'. I am somewhat uncomfortable saying your views were 'dissenting' I would rather consider them as being your 'considered legal opinion' or jurisprudence that had been refined. Same like what late Justice Antonin Scalia had been known as a great dissenter but he too had given a different opinion. Perhaps some such future date the dissent could be revived and can have a fresh look at it.

Hon. Michael Kirby: It is true that I wrote dissenting opinions more frequently than other Justices of the High Court of Australia (HCA). However, the statistics need to be understood and not exaggerated. A most important function of the High Court of Australia, as the nation's highest legal and constitutional court, is to grant special leave to appeal to the many litigants who seek it. On those decisions, there was rarely dissent amongst the Justices. If those statistics are included, my rate of dissent was not excessive and can be understood in context. Because virtually all cases now coming to the HCA require special leave, normally this will not be granted unless there has been a dissent in the lower court

or if the matter is seen as controversial and important.

In other courts on which I served, in the ALRC, and in many UN functions, I was not 'the great dissenter'. My level of dissent in the HCA can be traced to the importance and controversy of the issues that usually come to the highest court of a nation. But also, the appointment to the court of Justices who, like the government that appointed them, were conservative and rather traditional in outlook – at least in my view. In all independent final national courts, there are judges who are more 'liberal' than others. In the USA, liberal justices of the Supreme Court are generally, but not always, appointed by Presidents who are Democrats; and 'conservative' justices are appointed by Republicans. Australia has had a long run of conservative governments. In May 2022, a Labor Government was elected. It may be expected to endeavour to select appointees, who generally speaking, may be more 'liberal' in their general legal and personal values. This is a healthy feature of democracies. It means that the outlook of courts frequently changes over time. Justice Antonin Scalia, whom I debated in Australia and New Zealand, could only be appointed by a Republican administration. Justices Ginsburg and Breyer could probably only be appointed by earlier Democrat Presidents. The scramble to 'get the numbers' in the United States Supreme Court was evident when Justice Ginsburg died in the last weeks of the Trump administration. Whilst such phenomena are not so evident in Australia (partly because of the lack of a constitutional Bill of Rights) they do exist. As a former chair of the ALRC, and an active participation in civil liberties groups on my earlier legal practice and at the Bar, it could be expected that I would generally favour a 'liberal' or 'reformist' attitude to judicial decision-making. But this was certainly not simply applying politics from the judicial seat. It was no more than reflecting deep legal and social values in judgments. We can pretend that differing judicial values do not exist. But one English law lord (Lord Reid) rightly said that this was a 'fairytale'. In the law, we need to be honest and realistic, especially if we are judges.

The AAL Magazine: Lord Denning has been steadfast and remained optimistic that, despite the rebukes he received from his fellow Law Lords, his dissenting opinions in the Lords were worthwhile. He had dissented in his very first case in the Lords, *Rahimtoola v Nizam of Hyderabad*,a case concerning sovereign immunity. He returned to the topic some 20 years later in *Trendtex v Bank of Nigeria*' [1]Sir If in case you were to reflect upon your dissenting opinions, would you still consider reviewing some of your opinions in view of the developing law and circumstances. Would you go over your dissents through your scholarly work?

Hon. Michael Kirby: It is true, that on some issues, Lord Denning was 'liberal' and early in his judicial career he wrote many dissents. Some of these came, over time, to influence later judges and the trend of their decision-making. This was not universal. Sometimes, dissents sink like a stone. However, the right and duty of judges in appellate courts based on the English traditions of the common law, is to express their honest opinions in every case. Certainly, this is so in final courts that are not *bound* to apply earlier precedents.

This is not the tradition of the civil law, inherited in many countries including in France and Germany. Those who prefer preserving the right to dissent point out that it encourages honesty and truthfulness. Judges in final courts are not performing their duties 'on automatic

[1] Hon. S.C. Derrington, 'I dissent ; but why' https://www.fedcourt.gov.au/digital-law-library/judges-speeches/justice-s-derrington/s-derrington-j-20210706 accessed 23 May 2022

pilot'. On some issues (rights of women, minorities and religion) Lord Denning was conservative. Likewise in my own case, colleagues always told me that I was most conservative on the application of the common law of contract. I had the simple belief that contracting parties should fulfil their promises. I regularly resisted the importation into the bargains struck by business people (who neither expected nor deserved it) the interference of the conscience of equity.

The AAL Magazine: You said, 'the High Court, under the Constitution is independent. Each Judge has an equal voice. This is said to be 'all but universally recognized as a necessary feature of the rule of law'. Judges are expected be indifferent to political influence and expediency. Their independence necessarily includes, 'independence of one another'.[2] How does this square with one's political views. Does the views of the judges align with his or hers political views. How do you separate this alignment when political motives are not apparent but there could be subtle political undertones?

Hon. Michael Kirby: The HCA is politically independent of government. So are all other courts in Australia. It would be shocking and futile for politicians to interfere indirectly in judicial decision-making, at least outside the appointment process that belongs, in Australia, to politicians. In my 34 years as a judge of various courts in Australia, I never received any improper pressure, however subtle, from politicians or others outside the court, to attempt interference in my judicial decision-making. Corruption in the judiciary of Australia has been almost totally absent. Judges have very little personal contact with politicians and most like to keep it that way.

Sometimes the HCA has struck down, as constitutionally invalid, highly political legislation, often disallowing laws made by the governments that appointed them. The clearest example of this was the 1951 decision which declared that legislation of a newly elected conservative government, dissolving the Australian Communist Party, was invalid under the Constitution. This was based upon constitutional implications not a Bill of Rights: *Australian Communist Party v The Commonwealth* (1951) 83 CLR 1 at 193. This decision was a majority opinion where the court divided 5:1 to reject the enacted law in question, although the government had secured a mandate for it at a recent federal election. Two of the majority Justices had then only recently been appointed to the HCA by the conservative political party. I cannot say that every judicial reasoning of political importance evidences total political neutrality. However, except in the most general way, political alignment does not ordinarily control judicial decisions of the HCA.

The AAL Magazine: The Australian Financial Review[3] said Justice Kirby 'took part in fewer unanimous judgments last year than any other judge, concurred with other judges less often than anyone else and disagreed with the rest of the court in 20 of his 52 judgment's'. Is this a fair description of your opinions or do you have a rebuttal in this regard.

Hon. Michael Kirby: The *Australian Financial Review* (AFR), like most work of journalists, delights in oversimplifying complex issues. There is sometimes a value, if it can be achieved with

[2] Hon. Michael Kirby, AC, CMG, Consensus and Dissent and the Proposal for an Australian Statute of Rights. http://www.austlii.edu.au/au/journals/SCULawRw/2008/10.pdf accessed 23 May 2022

[3] **Chris Merritt, Legal Editor, The Australian Financial Review.** https://www.afr.com/companies/professional-services/robust-dissent-puts-kirby-on-the-outer-20050218-jlep8 accessed 23 May 2022

intellectual integrity, in endeavoring to secure unanimous opinions. This was achieved by the Supreme Court of Canada in an important case that concerned the constitutional procedures in Quebec to validly terminate its links with Canada and the other province of Canada's federation. See *Reference Re Secession of Quebec* [1986] 2 SCR 217 (Supreme Court of Canada). In Australia, we have not had any issue where unanimity was so important, such that individual Justices would feel obliged to abandon their personal professional views for the sake of agreement with the majority. I never felt that our disputes were of that character.

However, occasionally rulings on constitutional questions can be strengthened by unanimity. This occurred in Australia in a matter which, for a decade, had been hotly contested in the courts. I refer to the implication, drawn from the democratic character of the Australian Constitution and its institutions, that the Parliament could not validly impose restrictions on free discussion and debate deemed essential to ensure public awareness discussion of political issues. After several cases of disagreement, the HCA found a formula for upholding the implication, notwithstanding the absence of any express provision in the Australian Constitution that guaranteed such expression or free media: *Lange v Australian Broadcasting Corporation* (1997) 189 CLR 520. However, even this hard-fought achievement has recently come under reconsideration in the HCA. The same may likewise prove to be the case in the United States with the attempt to override the law of abortion, as expressed by an earlier Supreme Court in *Roe v Wade* 410 US 113 (1973). In India, after several ups and downs in consideration of the constitutional validity of Article 377 (sodomy) of the *Indian Penal Code* (IPC) in such decisions as *Naz Foundation v Union of India* (2009) 4 LRC 828 (Delhi HC); reversed *Koushal v Naz Foundation* (2014) 1 SCC 1 (SCI) and finally restored *Johar v Union of India* (2020) 1 LRC 1 (SCI). The unanimous decision at the SCI in 2020 helped to finalise this debate in India. Nevertheless, the Supreme Court's reasoning has not been followed by the Court of Appeal of Singapore in respect of the *Singapore Penal Code*, s 377A. Generally speaking, judges of final courts and beyond their independent right to express their own opinions, if necessary, in dissent. See Rohinton F Nariman, *Discordant Notes: The Voice of Dissent in the Court of Last Resort* (Penguin, India, 2021).

The AAL Magazine: I understand that Australia does not have a Bill of Rights; however Australia is a strong liberal democracy where rights of the people are upheld. I am however not sure whether Australians have the constitutional remedies with adequate guarantees that they would not be denied of their rights when they approach the Courts of Law. You had stated that 'The Australian Constitution evinces the purest form of federal democratic governance. There is no general bill of rights. The founders rejected the American model in this respect because they believed that Parliament could always be trusted to protect the rights of the people'.[4] Do you think there is a need for a Bill of Rights, if so how would you justify it despite the fact that Australia does claim a strong liberal democracy?

Hon. Michael Kirby: Australia does not have a comprehensive, still less a constitutional, BoR. In 1901, when the Constitution was adopted, it was believed that elected parliaments were the best protectors of universal human rights. Whilst this may generally be so,

[4] Hon. Michael Kirby, 'Constitutional and International Law, National Exceptionalism and the Democratic Deficit' http://www.austlii.edu.au/au/journals/UNDAULawRw/2010/6.pdf accessed 23 May 2022

experience has taught that sometimes legislatures are neglectful of the rights of particular citizens, including minorities. Over time, this has certainly been the case in Australia in respect of Indigenous peoples; women; racial minorities; and LGBTIQ citizens. That is why most modern constitutions, drawn up after 1950, have included express provisions amounting to a BoR.

In Australia any such fundamental constitutional rights must be derived, by a process of reasoning, from the language contained in the general provisions of the Constitution. This was the challenge that faced the High Court of Australia in *Mabo v Queensland [No.2]* (1992) 175 CLR 1. Indigenous People in Australia had, for more than two centuries, been denied recognition of the legality of their land rights. This approach to the law had been upheld in their earlier decisions by the Judicial Committee of the Privy Council and the HCA. The common law principle of *terra nullius* was overturned in *Mabo*. In part, the Justices, led by Justice F.G. Brennan (who died recently in May 2022) drew upon the principles of universal human rights to afford a principle of racial equality under the laws of Australia. Sometimes, similar reasoning has upheld provisions that were unpopular with some politicians and citizens. One such instance involved upholding the right of incarcerated prisoners: *Roach v Electoral Commissioner* (2007) 233 CLR 162; *Rowe v Electoral Commissioner* (2010) 243 CLR 1. Prisoners, even whilst incarcerated continue therefore to enjoy certain rights as citizens and as human beings. Even when politicians (supported by many other citizens) do not understand and support such rights, the courts should do so. In Australia, voting in federal, State and Territory elections is not only provided to all citizens aged 18 years or older. It is also compulsory. Thus, following the HCA decisions in the prisoner cases, custodial institutions throughout the country are obliged to provide opportunities to vote for prisoners serving sentences of fewer than 2 years imprisonment. Legislatures may occasionally march to the drum of populism. Courts should adhere to principles that are more lasting.

The AAL Magazine: Could you tell us Sir, how doctrine of Separation of Powers is balanced and maintained under the Australian Federal Constitution in terms of the power reposed in the State Supreme Court?

Hon. Michael Kirby: In the Australian Constitution there is a separation of government powers; but less extensive than in other countries. Indeed, because the executive government (Prime Minister and Ministers) must be elected to, and chosen from, Parliament, the separation of the executive and the legislature is not a feature of the Australian Constitution. In the case of the separation of the judicature from the other branches of government (legislature, executive, military and bureaucratic) is an implication derived by reasoning from the Australian Constitution and history; not an express provision. This principle has been regularly upheld and is strict so as to safeguard the independence of the judges: *R v Kirby ex parte Boilermakers Society of Australia* (1956) 94 CLR 254. Only courts may exercise the judicial power in federal matters. If something more than the formal application of the law to the facts is involved, it must be tribunals and other officeholders who decide the matter. They are not subject to the protections and obligations of the judiciary. This has sometimes led to conflicts at the borders of governmental powers.

The AAL Magazine: As you are aware, UK has centuries old legal precedents or the judge made law better known as the common law. It is a recognized principle that common law provides tools of making

rational decisions by the judiciary. Australian justices have grounded their judicial reasoning based on the sound English law doctrines or in some cases modified to the Australian conditions and circumstances. Given the post-Brexit scenario, do you think English legal precedents can now take primacy over the European jurisprudence and as a result Australian judiciary too will have to keep an eye on the development of judicial opinions in UK? What is your take on this?

Hon. Michael Kirby: As in the United States Constitution, the Australian document does not expressly provide for judicial or constitutional review as such, to determine the constitutional validity of other laws when challenged. However, that remedy was derived as a necessary implication from the text and functions of the courts. This is the way we delineate federal power from state power or judicial power from other sources of law applicable to States or Territories and other constitutional norms; *Marbury v Madison* 5 US (1 Cranch) 137 (1803). Early in its life, the HCA acknowledged the application of constitutional review as inherent in the Australian Constitution: *Ah Yick v Lehmert* (1905) 2 CLR 593. This principle is never now questioned today in the Australian context. It is well entrenched and a source of many challenges in cases coming before the HCA.

The AAL Magazine: As far as Australian Constitution is considered, there is no express provision which empowers the High Court to review legislation. As per section 109, which provides that a state law inconsistent with a federal law shall be invalid to the extent of the inconsistency and the court can very well strike down inconsistent state laws thus providing a basis for the judicial review power. Do you agree Sir that a country like Australia with a large readership of newspapers and mass media, the striking down of any legislation with popular support would go against the constitutional foundation of the Australian Constitution? Would not this drive people powerless to implement a policy measure through their elected representatives - because judges are against it.

Hon. Michael Kirby: Generally speaking, Australian citizens have supported the independence and powers of the courts. Even when an individual or group has been stigmatised by legislation, the courts have upheld the right of constitutional challenge and sometimes determined the challenge against the wishes of Parliament and/or the Executive Government. The *Communist Party case* (above) was a clear instance. Federal legislation to ban the Australian Communist Party, which had been enacted, was challenged in the HCA. One of the grounds for invalidity, upheld by the Court, was that the statute purported, in its Preamble, to recite the dangers and wrongdoings of international communism and thereby to assure the grant of power to the Federal Parliament to implement the prohibition. In 1951, the HCA by 5:1 declared that the Parliament could not 'recite itself into power'. That decision greatly upset the Menzies government of the day, fresh from its election, in which it had sought and achieved a mandate in 1949.

The Government therefore took this decision to a referendum of the people, designed to overcome the decision of the HCA. This referendum was voted upon throughout Australia in September 1951. That was only a few months after the HCA decision. The attempt to win express federal power for the proposed ban had been rejected by the HCA. Subsequently, the people voting at the referendum confirmed this outcome. The Government did not secure a majority of the national vote; nor a majority of the vote in the States of the Commonwealth.

The communism referendum therefore failed. In the result the government failed in its attempt to ban the Australian Communist Party. There have been other instances. The fact that the HCA had overruled the ban on communists was a substantial argument that persuaded the people of Australia to support the court's decision.

Media, including newspapers, frequently attempt to influence the outcome of constitutional referenda. They did so beneficially in 1967 when the Australian Constitution was reformed by a national vote of more than 90% of the electors to insert, amongst the governmental powers enjoyed by the Federal Parliament, a power to enact laws specifically with respect to Aboriginal people. However, in 1999 the Australian media had also strongly supported, almost without dissent, the proposal that Australia should change its type of government from a Constitutional Monarchy to a Republic. Because a majority of the people was suspicious of such a change, it failed to secure a national majority at the referendum, held for that purpose. It also failed to gain a majority in a single State. In the result, although media can try to influence political opinions and decisions, on changes to the Constitution Australia has been very cautious about enlargement of federal powers. Thus, Australia is still substantially governed under a federal constitution drafted in the 1890s and sometimes thought by 'experts' unsuitable to the problems of today.

The AAL Magazine: As you are aware, UK has centuries old legal precedents or the judge made law better known as the common law. It is a recognized principle that common law provides tools of making rational decisions by the judiciary. Australian justices have grounded their judicial reasoning based on the sound English law doctrines or in some cases modified to the Australian conditions and circumstances. Given the post-Brexit scenario, do you think English legal precedents can now take primacy over the European jurisprudence and as a result Australian judiciary too will have to keep an eye on the development of judicial opinions in UK? What is your take on this?

Hon. Michael Kirby: In Australia, in the past 50 years, since I was taught law at the Sydney Law School, there has undoubtedly been a big shift in the elaboration of law expressed in statutes enacted by the Federal, State or Territory jurisdictions. In Australia, statutory change and elaboration have has diminished the influence of the common law, although its principles are still referred to in challenges as to the meaning and validity of the Constitution and parliamentary legislation. Until 1986, with relatively few exceptions, most judicial decisions in Australia were subject to supervision by the Judicial Committee of the Privy Council in London. Until about 50 years ago, Australia shared a final court with Ceylon (later Sri Lanka) namely the Privy Council. That link began to diminish after the 1970s in Australia and in consequence of the *Australia Act* 1986 (UK and Aust). Lord Denning once declared that the tide of European law was coming in for English law. Except as it was derivative from the developments of the English common law, this was never the case in Australia. If European law came into Australia, it was often by the direct impact by analogy of the European Court of Human Rights or the European Court of Justice. That source of law has now been terminated, in the case of the ECJ. Recently, it has also been under challenge following the decision of the Johnson Administration in the UK to withdraw from the jurisdiction of the ECHR jurisdiction. This will be a loss to Australia if it happens. Sometimes the decisions of the ECHR have been very useful in influencing Australian cases concerned with universal questions of human rights. This was so in the decision

of the HCA upholding the rights of prisoners to vote in elections. It will be another indirect loss suffered as a result of the UK decision to embrace Brexit. The Brexit decision invoked a rare but strong statement from the UK Supreme Court, obliging the UK government to secure parliament any approval to authorise legally the withdrawal of the UK from the European Union. From the point of view of Australia, it is hard to perceive any advantage that Brexit has afforded to Australia. Indeed, many Australians are doubtful that the overall consequences of Brexit has been favourable for the UK.

The AAL Magazine: As far as Australian Constitution is considered, there is no express provision which empowers the High Court to review legislation. As per section 109, which provides that a state law inconsistent with a federal law shall be invalid to the extent of the inconsistency and the court can very well strike down inconsistent state laws thus providing a basis for the judicial review power. Do you agree Sir that a country like Australia with a large readership of newspapers and mass media, the striking down of any legislation with popular support would go against the constitutional foundation of the Australian Constitution? Would not this drive people powerless to implement a policy measure through their elected representatives - because judges are against it.

Hon. Michael Kirby: The power of, and access to, judicial and constitutional review are not expressly spelt out in the Australian Constitution. However, it is strongly implied therein. In a written constitution it is necessary to have an authoritative 'umpire' to decide the validity of laws subject to the constitutional instrument. This is why the judicial power in Australia has a foothold in the implications to be derived from the text of the Constitution about the expressly stated powers granted to the Federal Parliament. In Australia, as in the USA, the balance of lawmaking powers remains under the Constitution with the States and Territories, except in so far as the Federal Parliament has enacted a valid federal laws having impact on sub-national laws. The need for such a judicial "umpire" is rarely questioned given that the only alternatives would be provision of the power of review to the Federal Parliament itself (which would have a perceived interest in supporting its own proposed federal legislation); or for resolution of contests by the people of Australia (who have proved notoriously reluctant to amend the text of their constitution) and it would in any case a hopelessly cumbersome way of evaluating legal validity given the expense and delay of securing decisions by this means.

The AAL Magazine: I understand that in Australia, the constitution can only be amended through a referendum. Would you please describe the procedure to amend the Australian Constitution? [5]

Hon. Michael Kirby: The Australian Constitution was deliberately made very difficult to amend. This was because, although Australia was initially largely settled by migrants from the UK, it inherited many of the values then observed in the UK. These included the notion that parliament was supreme in expressing the sovereignty of the people expressed in parliament. Although the monarch is often described as the 'sovereign' of Australia, the way in which the Australian Constitution was adopted by procedures of colonial referendums in the 1890s, led to the judicial development of implied constitutional notions that the *people* of Australia must now be viewed as the true

[55] Hon Michael Kirby, 'The Australian Referendum on a Republic, Ten Lessons', https://www.hcourt.gov.au/assets/publications/speeches/former-justices/kirbyj/kirbyj_ten.htm accessed 223 May 2020

sovereign: *McGinty v Western Australia* (1996) 186 CLR 104, 485-6. Over the 121 years of the Australian Constitution, the text has been subject to 44 formal referendums to change its text. Only 8 have been successful in achieving a change by the constitutional majority. As explained, that majority in Australia requires not only a majority of the overall vote; but also a majority in a majority of states. This "double majority" requirement has led to Australia sometimes being described as 'constitutionally speaking, a frozen continent'. Yet sometimes these obstacles have saved Australia from changes that nowadays most Australians would regard as undesirable so far as the rights of the people are concerned.

Notwithstanding this resistance to formal amendment, many changes in the understanding of the Australian Constitution have been adopted following judicial decisions, including by the HCA. Within a repeated context, concerning the rule of law as the most basic constitutional norm in Australia (see *Plaintiff s157 of 2002 v The Commonwealth* (2003) 211 CLR 476 at 513 [103]), this very principle has endorsed constitutional decisions that surprised some people and annoyed others. Yet when courts, especially the HCA, have decided a constitutional controversy, the judicial ruling tends to be accepted. It has always been obeyed.

Just the same, many rulings of the HCA on particular constitutional words, or on ways judges should approach constitutional construction (see *Amalgamated Society of Engineers v Adelaide Steamship Co – Engineers Case* (1920) 28 CLR 128; (1921) 29 CLR 406), the authority of the HCA has been accepted and upheld even where it has followed an initially unpopular decision. The ruling in *Mabo [No.2]* (1992) was initially unpopular in political and business circles. However, with the abolition of the 'White Australia' policy concerning immigration, the adoption of a more beneficial approach to the equality of Aboriginal People has been a distinctive feature of judicial reasoning over the past 40 years. In fact, the HCA has played a significant role in educating the Australian population about the problems of racial and other discrimination that existed in earlier Australian society. This has extended not only to rights of First Nations People as in *Mabo*. But also discrimination affecting the rights of women; non-Caucasian migrants; and LGBTIQ people (in the *Commonwealth v Australian Capital Territory* (2013) 250 CLR 441, where the HCA held that marriage equality was available to sexual minorities under the federal power in respect to 'marriage'. That power was unanimously held by the HCA to be applicable to homosexual people in the Commonwealth. The court did not follow the approach of Justice Scalia and other Justices in the United States Supreme Court, of confining constitutional language to the 'original intent' of the Constitution at the time of its original adoption. In Australia, the very nature of a constitution, as a statement of principles and powers intended to last for decades or centuries, has been viewed as a powerful reason for rejecting the "original intent" approach. Instead, most Justices of the HCA have adopted a "living tree" approach. This has involved giving language, drafted in the 1890s; and adopted into law by the Imperial Parliament in 1901, a meaning that is applicable to the time in which the issue for decision calls for judicial decision and where that decision is expected to operate.

The AAL Magazine: Do you think there ought to be a fresh national dialogue on the Australian constitutional reforms? Where do you think the initiative to amend the constitution must begin from? Should the provision on the constitutional amendment itself be looked at afresh and

revised/changed before the structure of the constitution is contemplated?

Hon. Michael Kirby: Constitutional dialogue is a continuing process in Australia, as in more countries. This is so even if some provisions appear to be immutable. Such provisions would probably include the rule of law itself; the separation of judicial power; and the rejection of 'original intent' constructions. Formal amendment by the referendum process is clearly extremely difficult to achieve. Yet sometimes that obstacle has been overcome (as in the Aboriginal referendum in 1967). Yet occasionally, the impediment has arguably been wise (such as the defeat of the *Communist Party Dissolution Act* of 1950 by judicial decision and a subsequent referendum rejecting formal amendment).

At present, there is a lively discussion in Australia about incorporating in the Australian Constitution provisions designed to honour and respect the rights of the First Nations Peoples (Aboriginals and Torres Strait Islanders). The newly elected Australian Government received an electoral mandate on this issue in its recent successful electoral campaign in May 2022. The new government has promised action on this point within 3 years. Although it was not mentioned in the recent election campaign, the issue of a republic versus constitutional monarchy has also now been raised by the new government. However, action on this proposal has been postponed for at least 3 years. It may be later postponed still further. Most observers believe that the prospect of Australians voting for a republic during the lifetime of Queen Elizabeth II is remote. Although possibly paradoxical, many Australians consider that constitutional monarchies tend to be more stable and successful systems of government. They argue that they put a check on the powers and ambitions of politicians; reduce the force of nationalism; and play a useful role in establishing not what the monarch does, but in the type of people whom the monarch keeps out of the position of head of state. Ceylon and Sri Lanka, having earlier been governed as a constitutional monarchy and now a republic of evolving forms, would no doubt have views on this issue.

Australians need to become more familiar with constitutional reform, despite the double majority requirement necessary for formal amendment. On the other hand, in its actual operation, for the most part, the Australian Constitution of 1901 has operated within a capacity for renewal with the assistance of the courts and generally providing mostly a benign and stable government (with the assistance of constantly changing judicial and national values).

Within recent days of the preparation of this paper, a family of Sri Lankan immigrants without valid visas have been released from 4 years of compulsory detention in Australia. They were afforded bridging visas by the new Minister and released from federal custody to widespread acclaim and relief. They have been welcomed back to Biloela, a small town in remote Queensland. They even received a civic reception. They witnessed the strong affirmation by the local community that they were welcome, had jobs; enjoyed rights to schooling for their children in public schools, like mine; and enjoyed the general fruits of a peaceful land.

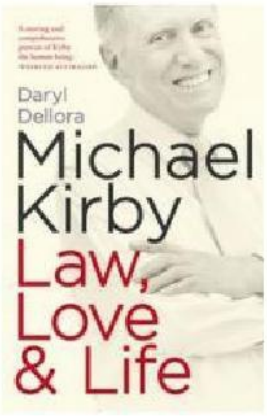
Australia is a land which is still coming to terms with its often-racist past. A measure of credit for this development rests with the judiciary. Judges have sometimes felt able, within the current law, to help to rescue Australia for its better angels. Racism and hostility were often marked features of earlier times. Racism is present in all nations, and to some extent, amongst all peoples. However, in Australia the role of the law

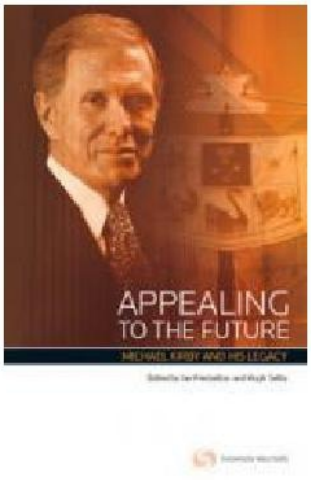
ha sometimes proved protective. I hope that this will remain the case; and will be enhanced by the adoption of a long delayed national statutory charter of fundamental human rights.

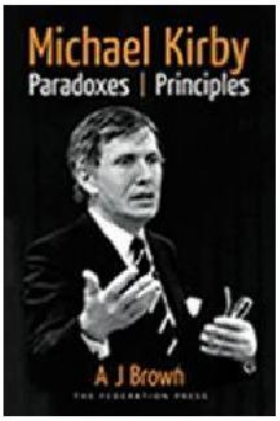
Because of my own sexual orientation, I naturally welcome all moves that encourage a multicultural, caring, welcoming and kinder society. When I was a judge, I reflected these values where appropriate; although it was sometimes rendered impossible by the clear expression of valid but harsh laws (see *Minister for Immigration v B* (2004) 219 CLR 365 at 426 [174] – [176]. Where there is no possibility of valid judicial re-expression of the law, a judge must apply the text.

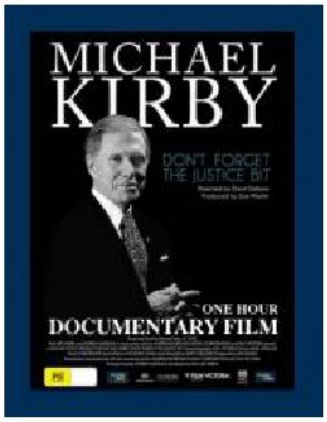
Yet sometimes there are, what my teacher Julius Stone taught, "leeways for judicial choice". When that occurs, judges and lawyers need to consider whether they should grasp the 'leeway'. As a great judge from Sri Lanka, and my friend, (Justice Christopher Weeramantry) taught, the exercise of a leeway for choice can sometimes secure guidance from the principles of international law, especially by reference to universal human rights law. Nationalism and pride in our own institutions, should never blind judges and lawyers to the law's serious imperfections. Or from the system of law that lies in wait for discovery containing the universal principles of fundamental human rights (*Al-Kateb v Godwin* (2004) 239 CLR 562 at 629 [190]-[191].

Those principles are shared by all civilized people who sometimes (but not always) include judges and lawyers. All of us have much to learn from the law in countries beyond our own shores. We must open our minds to these possibilities. See M.D. Kirby, "The role of the Judges in Advancing Hunan Rights by Reference to International Human Rights Norms" (1988) 62 *Australian Law Journal* 514 at 531 and Dr Nihal Jayawickrama.[6] In law, the search for legislative reform and re-expression by judicial exposition, are never fully at rest.









[6] "The Judicial Application of Human Rights Law: National Regional and International Jurisprudence", Cambridge Uni Press, Cambridge, 2002.

INTERVIEW - Hon. Richard Goldstone on Law, Justice and South African Constitutionalism

Former Chief Prosecutor of the United Nations International Criminal Tribunals for the former Yugoslavia and Rwanda From July 1994 to October 2003 Richard J. Goldstone was a Justice of the Constitutional Court of South Africa. He is presently the William Hughes Mulligan Professor of International Law at Fordham School. During the spring semester of 2007 he was the Jeremiah Smith, Jr. Visiting Professor of Law at Harvard Law School. From 15 August 1994 to September 1996 he served as the Chief Prosecutor of the United Nations International Criminal Tribunals for the former Yugoslavia and Rwanda. He is presently the co-chairperson of the Human Rights Institute of the International Bar Association. From 1999 to 2003 he served as a member of the International Group of Advisers of the International Committee of the Red Cross. He is a member of the committee, chaired by Paul A Volcker, appointed by the Secretary-General of the United Nations to investigate allegations regarding the Iraq Oil for Food Program.

His most recent appointment is to chair a UN Committee to advise the United Nations on appropriate steps to preserve of the legacy of the ICTY and ICTR. He is an Honorary Bencher of the Inner Temple, London, an Honorary Fellow of St Johns College, Cambridge, and an Honorary Member of the Association of the Bar of New York. He is a Foreign Member of the American Academy of Arts and Sciences. He serves on a number of boards, including the Human Rights Institute of South Africa, Human Rights Watch, Physicians for Human Rights, the International Center for Transitional Justice and the Center for Economic and Social Rights. He is the author of For Humanity: Reflections of a War Crimes Investigator, (2001) Yale University Press.

The AAL Magazine: Honorable Sir, We are truly honored by your consent to have an opportunity to interview you. You have had a very eminent judicial career spanning several decades. It is also a very rare pleasure of having reached the highest level of Judiciary in South Africa by becoming a Justice of the Constitutional Court of South Africa and then your expertise was demanded by the International Criminal Tribunals for the former Yugoslavia and Rwanda. You have also chaired a number of UN Special Commissions. You also held the high position of being the Chancellor of the University of Witwatersrand. You became the Prosecutor and were thrown in to global lime light. Could you tell Sir, how you began your journey - first by becoming a lawyer and then reaching top echelons of the South African Judiciary and then reached the International Criminal Tribunals for the former Yugoslavia and Rwanda. What

exactly drove your success as a Jurist of international repute?

Hon. Richard Goldstone; Thank you for inviting me to be interviewed for your distinguished publication. I began my legal journey as a law student at the University of the Witwatersrand. During the Apartheid era that university was one of only two universities in South Africa that admitted black students. Meeting and befriending black peers as fellow South Africans taught me at first hand the evils and cruelties of the Apartheid system. Black students had no choice but to live in ill-resourced black townships. Many did not have electric power. I lived in a privileged upper middle class suburb with all modern amenities. I became a student leader and became involved in the anti-apartheid movement. When I joined the bar (we have a hybrid systems of advocates or barristers and attorneys), I developed a commercial practice. When I was 40 years of age I was offered a permanent position on the the Transvaal High Court (as it was then called). It was a difficult moral question whether to accept an appointment to the Apartheid judiciary. Other anti-apartheid jurists had done so and were upholding the common law rights of victims of Apartheid. Not without misgivings, I accepted the appointment. I found important loopholes in Apartheid legislation and, as an illustration, issued a judgment that effectively brought an end to the system of segregated housing in the country. Because of the international pressures on the Apartheid government, decisions such as these were not reversed by legislation. As Apartheid came to an end in the early 1990s with the release from prison of Nelson Mandela and other freedom fighters, I was appointed to chair a judicial commission of inquiry into the causes of political violence that accompanied the transition from Apartheid to democracy. It was threatening to email the negotiation process. The Commission held over 40 hearings and was able to establish that much of the violence was the result of what Mandela called a "third force" - elements in the Apartheid police and army that were instigating violence in order to prevent the transition. The new democratic Constitution provided for a new apex court - the Constitutional Court of South Africa. I was appointed by President Mandela as one of the first eleven justices of that court. The Security Council of the United Nations established the International Criminal Tribunal for the former Yugoslavia (ICTY) in May of 1993. The statute of the court provides for the chief prosecutor to be appointed by the Security Council on the nomination of the Secretary-General. In September 1993, the fifteen judges were appointed. However, between September 1993 and June 1994, no less than eight nominees of the Secretary-General for the Chief Prosecutor were rejected by the Security Council. Five of them were vetoed by the Russian Federation. It was suggested to the Secretary-General that a South African nominee, supported by President Mandela, was likely to win the approval of the Security Council. That is how I came to be appointed as the first Chief Prosecutor of the ICTY. I had little knowledge of the states of the former Yugoslavia and not much more about International Humanitarian Law. So, it was a steep

learning curve for me. This was the first truly independent international criminal court (Nuremberg was a court appointed by the four victor nations at the end of the Second World War). I remained in The Hague for a little over two years and then returned home to join the bench of the Constitutional Court. I remained involved with international legal issues and, in 1999/2000, chaired the international inquiry into the NATO military attack on Serbia that was intended to protect the Albanian population of Kosovo. We found that the use of military force was illegal but morally justified. More recently, I chaired the Independent Expert Review that was established by Assembly of States Parties of the International Criminal Court to review the Court and the Rome Statute system. We reported in September 2020. Many of our recommendations have been implemented. The Review Mechanism that was appointed by the Assembly of States Parties to consider the recommendations of the Review Committee is still at work.

The short answer to the last part of your question is that any success that I achieved in the international arena was the consequence of my actual and perceived independence and the outstanding people with whom I was privileged to work.

The AAL Magazine: Sir, the mandate of our Magazine is to promote Anglo-American legal heritage. South Africa had been a British colony for over a century, and many principles of English law are still recognized and applied in South Africa. Though Roman Dutch law has a dominant influence over South African law, what is the level of acceptance and influence of English Law in South Africa? Where do you find Roman Dutch law is more influential than English Law. I know by now most of the principles either English law or Roman Dutch law may have been codified by legislation.

Hon. Richard Goldstone: Roman Dutch law was introduced as the common law of South Africa during the Dutch rule over the Cape Colony from 1652 to 1806 when it became a British Colony. As was the case with Sri Lanka, Roman Dutch law continued to be the common law even during British rule. English criminal and commercial law was introduced but Roman Dutch law continued to influence what was regarded as the common law. As you correctly state, legislation has codified the law in most areas. An interesting illustration of the application of Roman Dutch law is provided by the 1991 case of Ebrahim, who was a member of the banned African National Congress, and then resident in neighbouring Swaziland (now called Eswatini). Ebrahim was abducted by members of the South African Police and put on trial for alleged terrorism. The Supreme Court of Appeal, relying on Roman Dutch law, held that state sponsored abduction from a foreign state did not confer jurisdiction on a South African Court and Ebrahim was set free. The court expressly did not follow Anglo-American law that precludes a court from investigating how an accused person comes before it.

The AAL Magazine: As you know Sir Since 1994, South Africa has undergone a remarkable transition to democracy, initially under the 'interim' Constitution of 1993 and subsequently under the 'final'

Constitution of 1996. As someone who had held high office in the South African Judiciary how do you see this transition in terms of the development of constitutional and public law? Which areas do you feel have undergone marked changes? Where do you find some short comings in the South African legal system? Do you really see progress of South Africa despite the fact that there is a Constitution that has had legitimacy and acceptance from all races of South Africa? If someone were to say that People of South Africa have not as yet seen or felt much progress in terms of eliminating poverty though South African is known as a sunshine country. There are very large industries and there is a thriving export markets for South African products and natural resources. Would you attribute this to an absence of political will on the part of rulers or are there still constitutional and administrative structural issues and existential problems that beset the Government of South Africa - or is it owing to the inequality in the distribution of wealth and resources of the nation.

Hon. Richard Goldstone: The Constitutions of 1993 and 1996 introduced an abrupt change from the autocratic and racist system that governed South Africa from its colonial times until it achieved democratic rule in 1994. The Constitution became the supreme law of the land and with it, the rule of law and equality. Most of the Apartheid laws had been repealed prior to the 1993 Interim Constitution coming into operation. However, racist laws remained on the statute book and they were held to be unlawful in successive decisions of the Constitutional Court. The first case that came before the court related to the constitutionality of the death penalty. The court unanimously held that capital punishment was inconsistent with the provisions of the bill of rights and hence unconstitutional. The 1996 Constitution also introduced justiciable social and economic rights. That was a radical change and the courts have recognised justiciable rights to health, housing and education. Those rights are expressly subject to the financial ability of the government to progressively provide them but that notwithstanding there has been the recognition and enforceability of some of those rights.

The major shortcomings with regard to post-Apartheid South Africa, in my opinion, results from insufficient political will on the part of government to proactively use the Constitution to reduce the inequality in what remains one the most unequal societies in the world. The prime example relates to the ownership of land. Until 1994 the law enabled the white minority to own 87% of the land in South Africa. The legislation that enabled that grossly inequitable system was repealed at the outset of the democratic dispensation. Yet, the government failed to introduce policies that were efficiently directed at the readjustment and reallocation of land. Unfortunately, too, politicians blamed the property provisions of the Constitution to explain their inaction. There is presently much debate as to whether the Constitution requires amendment to facilitate those changes. In my view, it has been the politics and not the law that has been wanting.

In short, constitutional rights are of fundamental importance. But they can only bring relief to the poor and marginalised if the government of the day has the political will to enable those rights to be realised.

The AAL Magazine: We are under the impression that the 1996 Constitution received legitimacy and acceptance because it was meant to eliminate the apartheid time discrimination and racial laws. Has the Constitution succeeded in eliminating the discrimination associated with the apartheid era?

Hon. Richard Goldstone: The 1996 Constitution was indeed intended to be a bridge leading from Apartheid to democracy and equality. Its extensive and progressive bill of rights enshrines the rule of law including racial and gender equality. It has certainly eliminated the racial oppression and segregation that epitomised the Apartheid era. It is difficult for my grandchildren to imagine the South Africa in which I grew up. Discrimination between racial groups has been eliminated and gender equality, although not fully achieved, is incomparably more advanced than during the Apartheid era. The Constitution, however, has not been successful in eliminating the inequality of wealth between the majority black population and the minority white population. The levers of economic power remain predominantly, but no longer entirely, in the hands of white South Africans. Since the end of Apartheid a substantial black middle class and upper middle class has come into being. Those at the bottom of the economic pyramid still suffer in a country that has an unemployment rate of about 40%. This economic reality was exacerbated by the Covid19 pandemic. Fortunately, South Africa is not dependent on imports for staple foods. Yet the rising rate of inflation spurred by the war presently being waged by Russia on Ukraine is another factor adding to the plight of the poor. These problems are certainly not the consequence of the Constitution. Yet, at the same time, the Constitution is unable to rescue the situation. The answer lies in good governance and the elimination of the corruption which has, during the past decade, ravaged public funds. On the bright side, the degradation and oppression that characterised the Apartheid era has all but disappeared.

The AAL Magazine: There have been progressive dicta by the Constitutional Court holding that administrators must recognize international conventions such as UDHR whenever they are relevant to the functions of an administrative authority. One classic case is ***State v Makwanyane***. What is the extent of the clash between municipal law and international law in South Africa, and is it an impediment to the achievement of justice? Are there still lacunas in the municipal law of South African where vital international conventions have not been ratified by the Parliament of South Africa?

Hon. Richard Goldstone: The Constitution commands that when interpreting the bill of rights, international law must be considered; and in interpreting any legislation, every court must prefer any reasonable interpretation that is consistent with international law over any alternative interpretation that is inconsistent with

international law. In the *Makwanyane* Case, to which you refer, the Constitutional Court held that international law includes not only laws by which South Africa is bound, but also other international law such as the European Convention on Human Rights. South Africa has ratified all of the UN and African Union conventions of human rights as well as the Rome Statute of the International Criminal Court (ICC). I shall revert to the latter with regard to the case of President Al Bashir. The Constitution also recognises customary international law as the law of South Africa. To respond directly to your question, I am not aware of any formal clash between municipal law and international law in South Africa.

The AAL Magazine: You had the privilege of being the Chancellor of the University of Witwatersrand. How do you value the South African educational standards compared to the other parts of the African continent. I understand South Africa has a very high number of students from the other countries especially from the African continent. Does it not reflect the fact that South Africa has been able to maintain high standards in education? To what do you attribute this phenomenon?

Hon. Richard Goldstone: The standard of education in South Africa is indeed high in comparison to other countries on our African continent. During the Apartheid era that was true only of education for white South Africans. The education provided to the vast majority of our young people was grossly inferior and under-funded. This changed with the advent of democracy in 1994 and successive administrations have devoted equal funding for the education of all South Africans. The bill of rights provides that everyone has the right to basic education and, depending on available funding, to the progressive right to further education. In the poorer rural areas, basic education remains under-resourced and is inferior to that provided in the urban areas. All South African universities are open to all and there is extensive scholarship funding provided by the public and private sectors. As in many developing countries, those students who come from the lower income groups suffer from inadequate provision for accommodation, food and books. This is very much a work in progress. The University of South Africa offers remote (correspondence) higher education degree courses and enrols annually some tens of thousands of students from around our continent. The regular universities also enroll many foreign students. The high standard of education provided to white South Africans during the Apartheid system is now available to all students.

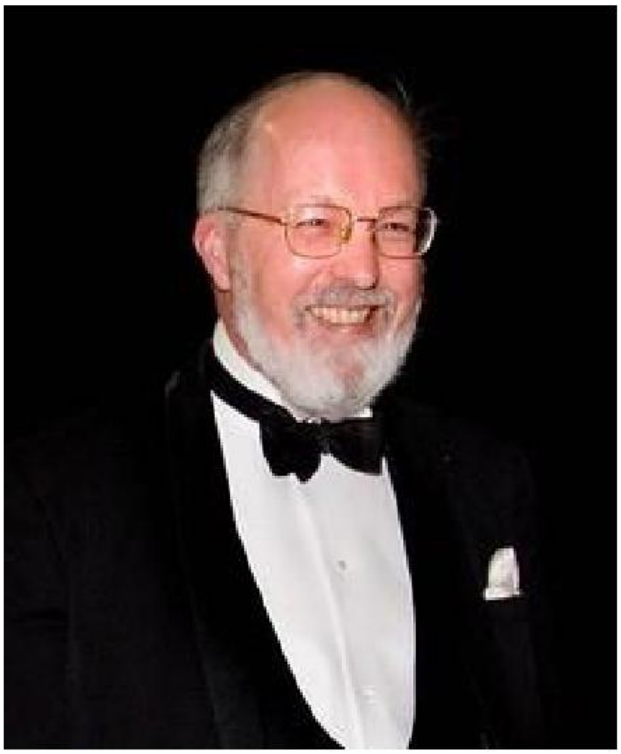
The AAL Magazine: If I may take you into human rights law, you may recall Sir, there has been a controversy surrounding the issue involving the former President of Sudan, Omar Al-Bashir's visit to South Africa for the African Union Summit. He had been invited by the South African Government in defiance of the arrest warrants by the International Criminal Court which had been issued over the alleged War Crimes and Genocide in Darfur. Do you think there has been a serious dereliction by the South African Government by inviting him in the first place and according him VVIP space, and then let him leave the country whilst a court

warrant was being contemplated. Could you please explain what really went behind and the position of the international law in this regard in terms of what South African Government ought to have done and on the responsibility of the nation states on recognizing the 'Universal Jurisdiction Principle' in general?

Hon. Richard Goldstone: The case of Al-Bashir case was most unfortunate. The arrest warrant against the then president of Sudan was issued by the ICC pursuant to the referral of the Sudan situation to the ICC. That referral was made pursuant to e resolution of the Security Council under Chapter VII of the UN Charter: it was thus binding on all UN member states. In addition, as mentioned earlier, South Africa has ratified the Rome Treaty. Our courts held that the South African authorities were legally obliged to arrest Al-Bashir at the time he was visiting South Africa in order to attend the African Union Summit. Soon after the High Court ordered that Al-Bashir was not allowed to leave the country before the court ruled on the execution of the arrest warrant, the government hastily bundled him out of the country.

The Al-Bashir visit to South Africa took place at the height of the African Union campaign against the ICC. Indeed, the AU instructed each of its members who were parties of the Rome Statute to withdraw their ratification. Fortunately for international criminal justice, only one member of the AU did so - Burundi. South Africa's initial attempts to do so were frustrated by the courts (for technical procedural reasons) and then by the changing politics after the end of the Zuma Administration in 2018. The unjustified allegation that the ICC was biased against African states has receded and especially so since the ICC has become involved in non-African situations.

INTERVIEW - Prof. Sir John H. Baker Q.C., LL.D. (Cantab.), F.B.A., On the History of the Laws of England.



Prof Sir Baker was educated at University College London (LLB 1965, PhD 1968). He was called to the bar by the Inner Temple (1966) and taught law at University College London (1965-70) and Cambridge University (1970-2011). He was appointed Professor of English Legal History, Cambridge (1988-98), Downing Professor of the Laws of England (1998-2011), Fellow of St Catharine's College, Cambridge (1971-) and University College London (1991-); LLD, Cambridge (1984); Fellow of the British Academy (1984) and Honorary Foreign Member of the American Academy (2001); Honorary LLD, Chicago (1992); Honorary Bencher of the Inner Temple and Gray's Inn; Queen's Counsel honoris causa (1996); knighted for services to legal history (2003); Literary Director of the Selden Society (1981-2011); author of *An Introduction to English Legal History* (1971; 5th edition, 2019), *The Reinvention of Magna Carta 1216-1616* (2017); *English Law under Two Elizabeths* (2021), and numerous other books and papers.

The AAL Magazine: What a great pleasure and honor it is to interview such a distinguished Downing Professor Emeritus of the Laws of England at the University of Cambridge where you have excelled in research on the History of Laws of England. Professor, I have had the benefit of reading your profile which gives details of a serious of books and volumes you have published. I think your contribution to the history of the Laws of England is so immense and I really could not understand the amount of time you must have invested in gleaning all the information produced therein. You have delved deep into the history of England the development of law in such a background where searching historical materials are extremely difficult and it is indeed a huge exercise in research. You have been amply rewarded with a number of high academic credentials and honorary doctorates by Universities in recognition and in honor of the research you had undertaken. If I may begin this interview, could you explain to us as to what this 'Downing Professor' denotes?

Prof. Baker: It is the name of the first chair of English law established in the University of Cambridge. It was originally part of the foundation of Downing College, named after Sir George Downing (d. 1749).

The AAL Magazine: It is not clear as to what constitute the 'Laws of England' and

the 'English Common Law'. Of course Common Law is the Judge made law, my issue is whether there could be some elements of judge made law having been codified and the Laws of England having been introduced by the Parliament. Could there be some intermingling of both. Judge made law could not possibly have been derived without reference to the political and social setting at the time the Judge expounded the law unlike in the U.S where the law is expounded with reference to what framers had in mind at the time the constitution was drafted. Would you elaborate on the research that you have undertaken especially in the context of the social settings.

Prof. Baker: As you say, the laws of England consist of both statute law and unwritten common law. The position is similar in the United States, save that the Supreme Court has assumed the power to strike down legislation which it considers to infringe the written constitution. Exercising that judicial power to review legislation creates a different kind of judge-made law, though I think it is a matter of controversy whether it should be tied to the original intent or whether it can evolve like the common law. If they followed the original intent, they would still have slavery. In the United Kingdom we do not have a written constitution and therefore Parliament is supreme. Acts of a legislature obviously respond directly to social changes and political pressures. But the relationship between the common law and social change is more complex than one might think. The common law does have to adapt as the world changes, but the judges cannot simply overturn long-standing principles derived from centuries of argument and reasoned thinking. It is therefore a slower process, moving step by step from an agreed starting point – and it may sometimes be so gradual that Parliament feels it necessary to take over. One thing the judges are not free to do is to impose taxation, and this means that they cannot by developing the common law bring about the kind of social reforms which require monetary expenditure or which require the balancing of interests which are not represented before them in particular litigation. Even setting up enquiries to consider reforms costs money.

The AAL Magazine: If I may ask you Professor, you have started the Volume I from the Canon Law and Ecclesiastical Jurisdiction from the fifth century to sixteenth century. I would say it is a fairly long period - almost a millennium. Would you expatiate upon on the nature of research that must have influenced this volume? England was governed by Roman Empire up until fourth Century surely there must have been some sort of a clash of Papal influence of Roman law and the adopting of Latin legal maxims. The first volume also covered the period between the emergence of Protestant movement in England and Europe ending Sixteenth Century.

Prof. Baker: the Oxford History of the Laws of England is a series of volumes written by different authors. I am the general editor but have only written one of the volumes myself – Volume VI (1483-1558). Volume I was written by Professor Helmholz. But I can respond to your question by saying that the Christian Church probably did not reach England until after the Romans had left.

There was therefore no Roman law operating in England which could have influenced the law of the Church when it was received here. That influence came through the universities, starting with Bologna, where doctors trained in Roman law reduced the rules and regulations of the Church into some kind of system. I don't think this could be called a clash – the two systems of law went hand in hand. If there was a clash it was with the English common law, which was developed by lawyers practising in the king's courts. Until the nineteenth century those lawyers belonged to a completely separate profession from the doctors of law who practised in the Church courts.

The AAL Magazine: Was there a social phenomenon that changed the style of governance and enactment of laws which were pro Roman Government and the defiance of Roman law under Protestant movement after the 15th Century. Was there any deliberate move to defy the Roman laws enacted during Roman influence in England?

Prof. Baker: As I said in my last answer, the Roman law did not operate in England after the Romans left – which was many centuries before the common law came into being. I think your question relates more to the law of the Church. In England, the Church's jurisdiction was primarily concerned with marriage, wills, intestate succession to movables, and the punishment of lesser sins. Land law, contract, tort, and the punishment of more serious crimes belonged to the king's courts of common law. The break with Rome in the sixteenth century had virtually no effect on the jurisdiction of the Church courts, since the law of marriage, wills and succession remained the same. It was more about theology, and whether it was right to burn people alive for failing to believe in the theories of theologians.

The AAL Magazine: Your Co-Editor John Hudson, has delved into translations and quotes extensively from the original sources which were previously only available in Latin, Old English and Old French, and he has opened the source for a wider range of readers. Professor, how were these sources referred to and where were you able to source them. I know England has a corpus of literature from the early times and they are well preserved by the Archivists. The Church of England Archives Oxford University Archives are yet another source of ancient archival repositories. Would you advise as to how these sources were accessed to as I feel a future researcher might find it interesting. Where do you consider being the place from which you got 'a wealth of information'? To which library do you attribute being the greatest repository of the English law history?

Prof. Baker: As I indicated in a previous answer, John Hudson was the author of the second volume in the Oxford series, not a co-editor. He had to use a wide range of original sources, because much of his period predated the keeping of records by courts. For the later periods on which I have written myself, we have a continuous record – written in Latin on parchment – of every case heard in the central royal courts from

the 1190s onwards, and an increasing range of records of cases heard in other courts, not to mention a professional literature and more plentiful extra-legal sources. The Church itself has few if any records of this kind – indeed, the Church of England as such does not have a relevant archive. The principal records are in the Public Record Office at Kew (near London), and most of the court-records which are kept there can now be read in digital photographs – at any rate, by those who can read abbreviated Latin written in 'court hand' – via the website called Anglo-American Legal Tradition (http://aalt.law.uh.edu/). This is a resource of immense value, created by the energy and dedication of Professor Robert Palmer of the University of Texas at Austin and a team of helpers. Besides the records kept by courts, there are the law reports and other materials written by lawyers. These have survived in libraries all over the world. The largest collection of legal manuscripts (other than records) is in the British Library, London, followed by Cambridge University Library and the Harvard Law School. Many important texts, including medieval and early-modern law reports, have been edited by the Selden Society, with parallel English translations of the Law French and Latin. Printed law books from the fifteenth century onwards can be read via the website Early English Books Online. But the full range of available material is very large, including for later periods treatises, lectures, opinions of counsel, lawyers' correspondence, family muniments, and so on. We can also sometimes derive insights from lay literature and polemical tracts.

The AAL Magazine: We would like to know how the English law has evolved over a long period time and what were the core elements of English law, that was subjected to change over such a long period of time. Was it the rationality and reasoning on which the British judicial system was grounded or could there be any other reason which you have discovered during your research.

Prof. Baker: That is rather a large question to answer in a nutshell, though I have suggested the outlines of an answer already. Statutes come from Parliament after political debate and, being written, lack the flexibility of the common law. The judges cannot rewrite statutes to make them more sensible or rational, but they do have to interpret them and their decisions as to what statutes mean form a kind of case-law which is different from the common law. The development of the common law itself is quite different, since it takes place over the long term as a result of argument in court by lawyers putting opposing points of view, and reasoned responses to those arguments by judges and appellate courts. Every new step has to be justified in terms of previous reasoning, though it is sometimes possible to correct what seem to be errors in previous conclusions or to introduce countervailing reasons which were not considered in previous cases. In many respects the methodology of the common law is superior to that of parliamentary statutes, though the latter necessarily take precedence and can extinguish common law. Legislation is necessary to bring about changes which courts are not permitted to bring about,

especially those which require public funds to be made available. Nowadays we live in a regulatory state and so most of the law is contained in statutes and statutory instruments, though most of it is quite unknown to ordinary persons (or even to lawyers) and does not directly concern them. In late medieval times, most of the law was common law, found not only in reported cases but also in the teaching of the inns of court. The earliest statutes were brief and broadly worded and also had to be expounded by courts and in the inns of court. However, the development of the common law by reasoning from case to case has followed much the same pattern over a great many centuries. What has changed is not so much the fundamental character of the common law as the world on which it operates.

The AAL Magazine: Professor, I would be curious to know how Normans, who spoke French, had enjoyed customary law in Normandy, there does not seem to exist any evidence of any professional lawyers or judges or any judicial system existed in Normandy. The clergy was hugely influenced by the Roman law and the Canon Law of the Christian Church. How was the reception of Norman influence in developing the English law? What impact did it have on the development of English law principles? Do you think this is a new area for further research?

Prof. Baker: How far the Norman 'conquest' of England in 1066 altered English law was a topic of heated controversy in the time of Elizabeth I and it is still being argued about in the time of Elizabeth II. The Normans themselves were keen to emphasise legal continuity from before 1066, since they claimed England by right rather than by conquest; but they did in fact introduce significant changes in the patterns of landholding. Their innovations were not a matter of transplanting jurisprudence but a reflection of military feudalism, which was to some extent a form of social organisation imposed from above. But they had to be blended with what was there before. You are right that there were no professional lawyers in Normandy in 1066, any more than there were in England. And there were variable customs rather than a body of law like the common law. We usually consider the common law to have come into being during the twelfth century, not as a direct result of the Norman invasion but as a result of the strengthening of central institutions. You cannot have a 'common' law – that is, a law common to the whole country, until you have a legislature and a legal system exercising a uniform authority over the whole country. There is much valuable research already being done on these questions – for instance, in addition to Professor Hudson's book in the Oxford series, the work of Professor George Garnett. As to French, it was used by English lawyers (in a gradually declining dialect known as Law French) until the seventeenth century; but it was not the French of the Normans. It seems to have been adopted in the early days of the common law for argument in court, not in deference to the Normans but because it was a more standardised language than the English dialects of that time and more readily transposed into the Latin of the records.

The AAL Magazine: Professor according to the history of the Inns of Court, they seem to have begun professional training after 15th century. The oldest one among the four is Inner Temple which has a history stems from 12th century onwards. The King's Inn - which still operates in the Republic of Ireland - had commenced its operations during the 15th century when Ireland was under British Dominion. Would you please elaborate on the standards of legal training at the time English justice system evoked from the history?

Prof. Baker: I think the Inns of Court began in the mid-fourteenth century and there is evidence that they had educational functions more or less from the beginning. Although I am a bencher of the Inner Temple, I could not in honesty support a suggestion that it was older than the others. The Inns certainly did not exist in the twelfth century. The Temple existed then, but it was the home of the Knights Templar, not of lawyers. We still have the ancient Temple Church, part of which was consecrated by the Patriarch of Jerusalem in 1185, on whose floor lie stone effigies of knights – including William Marshal, one of the instigators of Magna Carta. But the lawyers came after the order of knights had been dissolved and their possessions given to the Knights Hospitaller of St John, who did not need the Temple for their own use. Before 1400 each of the four Inns of Court – supported by ten or so lesser inns for younger students – had developed an educational regime based on that of the universities, with lectures (given on statutory texts) and disputations or moots. That system collapsed in the seventeenth century, but it has since been replaced by a modern equivalent. A significant change in legal education occurred in the nineteenth century, when the universities of Cambridge and Oxford – which had always taught Roman law – and also the newer universities began to teach and give degrees in English law. Intending lawyers could then learn the basic principles of English law at university and move on to the more practical aspects of the law after graduation.

The AAL Magazine: Professor, why there is a separate body of Poor Laws developed in England. Why was it required to focus on Poor Law when Britain was relatively a wealthy nation by 15th Century? There may have been a temporary setback but why was it made known as Poor Law.

Prof. Baker: We now call it social security, and the root premise is that some people are not sufficiently fortunate to be able to earn their living by their own efforts or to be supported within a family. How to deal with this problem has been a matter of debate and the subject of various legislative solutions from the sixteenth century to the present. It was not a matter for the common law, because it required the taxation of those who were more fortunate in order to support those unable to work, and this was originally managed at a local level of government – the parish (usually corresponding to a village, or part of a town). The main difficulty, in the sixteenth century as now, was how to make a fair distinction between those who were genuinely incapable of working and those who were simply idle. That calls for political decisions and actions rather than legal reasoning, and I suppose that is why legal

historians have not paid it as much attention as perhaps it deserves.

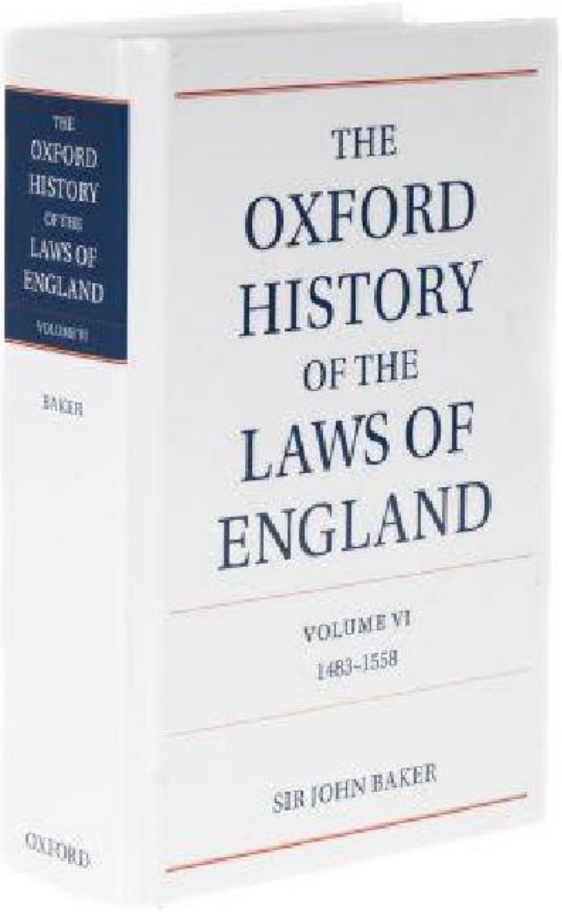
The AAL Magazine: Sir Mathew Hale says legislation of 1598 and 1601 was passed at a time when the problem of poverty was unusually severe. There had been a low productivity of harvest and it was the worst of the period. There had been a steady increase of issues involving unemployment and food supplies which had not kept pace with. Professor why did it take such a dramatic turn to refer to these laws as English Poor Laws. What sort of laws are considered poor law and are they still in force.

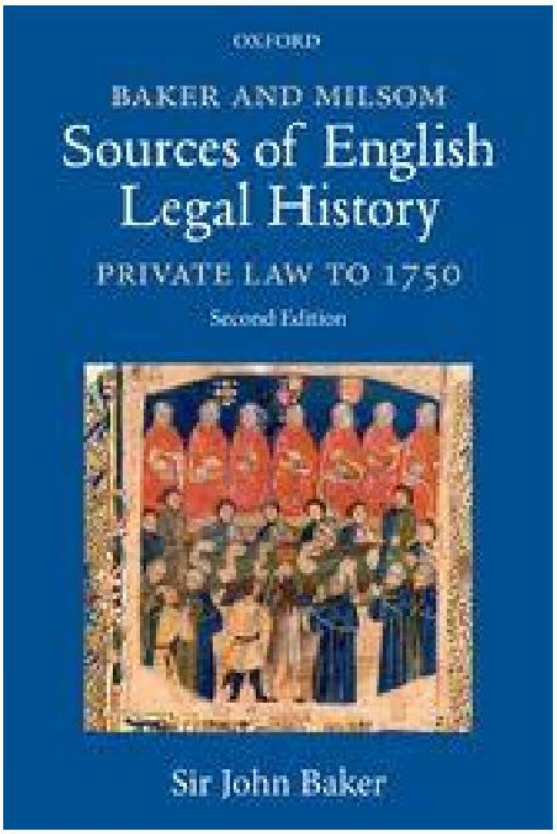
Prof. Baker: I cannot really add to my previous answer. There were poor laws continuously in being from the sixteenth century onwards, but their content was constantly being adapted not only to deal with emergencies such as poor harvests and plagues but also to reflect different theories as to the best remedies for poverty. There was a major overhaul of the poor law in the early nineteenth century with the establishment of 'work-houses', but we now have a more sympathetic approach to social security. As I have indicated, it is not a subject on which I have conducted any research myself.

The AAL Magazine: Professor, prior to your research there have been some research on the History of English Law by Sir William Holdsworth, Sir Frederic Pollock co-authored with Frederic William Maitland, John Hudson, Harold Potter, Mathew Hale, and yet another one by George Crabb etc. How do you compare your extensive volumes published by the Oxford University Press and what sort of new sources you have discovered during this research?

Prof. Baker: As with the common law, so our understanding of English legal history develops gradually from one generation to another as a result of research and debate. We all build upon what went before. Coke, Hale, Selden and other early writers were interested in legal history chiefly because they thought it directly informed the law of their time. History was not an end in itself, and it did not enter the university curriculum until the later nineteenth century. The Selden Society was named after John Selden (d. 1654) with good reason, though most of us now regard the founder of our subject in its present form to have been Maitland – prime mover of the Selden Society in 1887, and Downing Professor of the Laws of England from 1888 to 1906. Holdsworth's massive history is not so much consulted today, and the reason is that it was only practicable for him to write it from published sources. The principal change in English legal history since the death of Holdsworth in 1944 – four months before I was born – is that we have come to appreciate the fundamental importance of materials beyond the printed law reports and statutes. The principal legal historian of the twentieth century is one you did not mention, Professor S. F. C. Milsom (d. 2016), who had more influence on my work than any other. But it is right to mention also Professor A. W. B. Simpson (d. 2011), another pioneer of the use of manuscripts, and there are several others now living whom I will not embarrass. The purpose of the Oxford History of the Laws of England

is to provide the same breadth of coverage as Holdsworth while taking account of subsequent research in a wider range of sources. It is proving a lengthy task, though – it is well over thirty years ago since we decided to undertake it, and only about half is finished. Some of the original authors died before writing anything, and others seem to have been overwhelmed by the task. But it will be finished one day.





All human beings are prone to lose his or her focus and inner consciousness owing to the physiological and biological changes that can influence ones thought process, but that cannot be defended in a court of law. In an action for damages for negligence, the plaintiff must prove that the defendant should have had a duty of care towards the plaintiff and that defendant had breached that duty and as a result the plaintiff suffered damage. In *Mckew v Holland & Hennen & Cubbits Ltd*, [1]the court held that defendant was having a medical condition borne out of an accident and having been cognizant of the physical condition, defendant took yet another risk and got injured thus broke the chain of causation of the first accident. Reid, J says in the judgement that "if the injured man acts unreasonably he cannot hold the defender liable for injury caused by his own unreasonable conduct. His unreasonable conduct is *novus actus interveniens*. The chain of causation has been broken and what follows must be regarded as caused by his own conduct and not by the defender's fault or the disability caused by it. Or one may say that unreasonable conduct of the pursuer and what follows from it is not the natural and probable result of the original fault of the defender or of the ensuing disability. I do not think that foreseeability comes into this. A defender is not liable for a consequence of a kind which is not foreseeable. But it does not follow that he is liable for every consequence which a reasonable man could foresee. What can be foreseen depends almost entirely on the facts of the case, and it is often easy to foresee unreasonable conduct or some other *novus actus interveniens* as being quite likely. But that does not mean that the defender must pay for damage caused by the *novus actus*". An intervening act can also arise from a public functionary either through commission or omission. The doctrine must be looked at afresh to bring in laws to codify the principle so that public authorities too must be taken to task.

[1] *McKew v Holland & Hannen & Cubitts* (Scotland) Ltd. [1969] 3 All ER 1621

The much celebrated case *Donoghue v Stevenson*[2] opened the flood gates on the Doctrine of Duty of Care and case law developed over the years and ended up producing a huge corpus of jurisprudence on the law of negligence and damages and it evolved into producing a hefty publication *McGreggor on Damages* – a common law publication - by Sweet and Maxwell and has now reached its 21st Edition. There are a number of text books published in the U.S and in the Commonwealth countries. The 'neighbour principles' has been watered down in view of the advent of technology. The living standards have undergone tremendous changes and the society at large is now hooked on to technology. Since there is greater connectivity among the members of the society through social media and telecommunications technology, the 'neighbour principle' could now be extended to the internet and the mobile phone. As such a holistic look into 'neighbour principle' must now be extended to an elected responsible government as well.

Could a vulnerable member of the society either a minor or an older person with medical complications rely on the technology, GPS system, Google Earth map, to call for an Ambulance in a medical emergency. Should the Doctrine of Duty of Care now be extended to public law sphere where Human Rights conventions and Bill of Rights are now anchored? If the Municipality, Hospitals, Police or Ambulance Service is connected through electronic paraphernalia then the general public would now be more prone to bring litigation against the public authorities if the emergency response is delayed in which case charges could be brought against the public service provider in tort liability.

The Principles of the Doctrine of Duty of Care was espoused by Lord Atkin in the pivotal case of *Donoghue v Stevenson* in 1932.[3] Lord Atkins could not possibly have imagined the technological advances that we are enjoying now. He said then "*You must take reasonable care to avoid acts or omissions which you can reasonably foresee would be likely to injure your neighbor. Who, then, in law, is my neighbor? The answer seems to be – persons who are so closely and directly affected by my act that I ought reasonably to have them in contemplation as being so affected when I am directing my mind to the acts or omissions which are called in question.*" Should the public authorities be more concerned about the vulnerable people in the society? Should the Government be held responsible if it fails to warn of an impending calamitous weather conditions or failure to clear road traffic so that an Ambulance or Police response vehicle could have made its way to help a patient or a victim of a crime? What standard of care should the government take to minimize the human suffering and property damage?

The doctrine of 'duty of care' has also been articulated by Lord Wilberforce in *Anns V. Merton London Borrow Council*[4] "whether there is sufficient relationship of proximity or neighbourhood, such that, in the reasonable contemplation of the former, carelessness on his part may be likely to cause damage to the latter, in which case a prima facie duty of care arises" and the second test is, if the above is affirmative, whether there are grounds "which ought to negative, or reduce or limit the scope of duty or the class of person to whom it owed or the damages to which a breach of it may give rise".

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[2] *Donoghue v Stevenson* [1932] A.C. 562, [1932] UKHL 100

[3] *Ibid*

[4] *Anns v Merton London Borough Council* [1978] AC 728

As Turton[5] argues that "proximity factors include: the extent of the defendant's control over the risk, whether the defendant created the risk, the extent of the defendant's knowledge of the risk, the magnitude of the risk and degree of foreseeability of the harm, the extent of the claimant's vulnerability to harm arising from the risk, the extent to which the claimant relied on the defendant, whether the defendant knew of that reliance and whether the defendant can be said to have assumed a responsibility, either to the claimant or for a particular task". This may now extend to public law, the Government operations are now fully connected to the Internet it collects biometrics. It has access to updated electoral registers and details on the people who depend on doles. It can access records from Hospitals as to who needs emergency medical care. The Governments also maintains a network to monitor citizen movements on national security grounds. The Government does have a much broader control over the citizen movements that was the case *with Donaheu v Stevenson* in 1932. The *Donahoe* principle has polarised and the issue must be looked at from a public law perspective. The duty of government towards the citizens was amply demonstrated when the Covid pandemic hit the world. The emergency response to Covid 19 had a devastating effect on the livelihood of people across the world. Its prevention, subsequent management and the mitigation of the spread of Covid 19 had brought along with it new ideas on the Doctrine of Duty of Care by the government towards the citizens.

[5] Turton, J., 2012, *A critical analysis of the current approach of the courts and academics to the problem of evidential uncertainty in causation in tort law*, PhD Thesis, University of Birmingham. p.45 https://etheses.bham.ac.uk/id/eprint/3943/1/Turton13PhD.pdf accessed 15 June 2022

Litigation in Australia

The Doctrine of Duty of Care was examined in *Crimmins v Stevedoring Committee* [6] in which Gleeson CJ, said 'In the context of the powers and functions set out above, it is claimed that the Authority failed to warn of the dangers of asbestos, failed to instruct as to those dangers, failed to provide respiratory equipment, failed to encourage employers to introduce safety measures for the handling of asbestos, failed to ensure that employees were aware of the risks of exposure to asbestos and failed to properly inspect the conditions under which stevedoring operations were carried out'. Gleeson CJ's remarks do have an impact on public law. An Authority is necessarily an arm of the Government which provides a public function. If one were to go by this argument, the Government would be bound by the principles of morality, responsibility and accountability to protect people from all dangers, including proper warning on an impending calamity, a bushfire, a calamitous climate, and a tornado. The adverse effects of these are to a great extent can either be controlled prior to its occurrence or measures could be taken to mitigate its effect on people, their property and livelihood and assessment of lost opportunities and financial loss. Does the Government have a duty of care to make due measure to prevent such a calamitous scenario. The International Convention on Political and Civil Rights ICCPR stipulates that Government must take reasonable measures to promote political and civil rights. There are a raft of international conventions that has a bearing on the measures to be adopted by governments

The common law doctrine must now be codified as in the case of incorporating

[6] *Crimmins v Stevedoring Committee* [1999] HCA 59; 200 CLR 1; 167 ALR 1; 74 ALJR 1 (10 November 1999)

provisions of the UDHR/ICCPR in the constitution. A similar effort must be made to codify the doctrine. The civil liability of the public authorities must be spelt out and it gives the public authority to pass muster a special test on the Duty of Care principle when new policies are adopted. This does have a bearing on risk management portfolio of a public authority. This doctrine must be looked at by the **Accounting Standards Board** for a provision to be made in the financial accounts. The insurance companies can adopt a risk policy based on the risk spread in a public authority as to the potential litigation that might arise from the 'Doctrine of Duty of Care'.

In Graham *Barclay Osyters Pty Ltd v Ryan*,[7] Gummow and Hayne JJ said 'An evaluation of whether a relationship between a statutory authority and a class of persons imports a common law duty of care is necessarily a multifaceted inquiry. Each of the salient features of the relationship must be considered. The focus of analysis is the relevant legislation and the positions occupied by the parties on the facts as found at trial. It ordinarily will be necessary to consider the degree and nature of control exercised by the authority over the risk of harm that eventuated; the degree of vulnerability of those who depend on the proper exercise by the authority of its powers; and the consistency or otherwise of the asserted duty of care with the terms, scope and purpose of the relevant statute. In particular categories of cases, some features will be of increased significance. However, Gleeson CJ cautioned that 'there are limits to the extent to which that is possible'. However the Court has not taken cognizance of the utility of technological advances and the access to information by the public authorities can have. The Risk mitigation should now be part of the administrative procedure and must take into consideration the potential hazards and liability in negligence, the authority would be liable for. However **Kirby J** said that 'the presence of foreseeability and factual features linking the parties does not automatically require the finding of a legal obligation to take care — it is for the court to determine the 'ultimate question' of whether a duty ought to be recognised. The court must exercise its discretion in determining whether to recognise the duty and, thus, a legal obligation owed by the defendant to the plaintiff'.[8]

Litigation in Canada

Prof Joost Blom has articulated that 'the Anns test originated in 1978 as a response to the pressure to adapt negligence law to new types of defendant (mainly public authorities or others exercising statutory authority), new types of damage (mainly pure economic loss), and new types of duty (mainly duties to take positive steps to protect the interests of another). *Anns v. Merton London Borough Council* itself involved all three. The claim was for pure economic loss suffered by the owners (on long leases) of flats in a building. The foundations had allegedly been negligently inspected, or not inspected at all, by the local authority so that the flats suffered structural damage. 4 The question of duty of care was argued as a preliminary question'.[9]

[7] *Graham Barclay Oysters Pty Ltd v Ryan* (2002) 211 CLR 540

[8] Christian Witting, 'Tort Law, Polity and the High Court of Australia', Melbourne University Law Review. 2007.p.575

[9] Joost Blom, 'Do we really need Anns test for Duty of Care in Negligence' Alberta Law Review 2016, p.895

The Supreme Court of Canada, in *Nelson (City) v. Marchi*, [10], looked into an issue involving an accident where the plaintiff suffered. City employees had plowed the snow to the top of the parking spaces, creating a continuous snowbank along the curb that separated the parking stalls from the sidewalk. The City employees had not cleared an access route to the sidewalk for drivers parking in the stalls. Plaintiff parked in one of the angled parking stalls. She was attempting to access a business, but the snowbank created by the city blocked her route to the sidewalk. She decided to cross the snowbank and seriously injured her leg. She sued the city for negligence. The trial judge dismissed her claim concluding that the city did not owe her a duty of care because its snow removal decisions were **'core policy decision'**. In the alternative, he also found that there was no breach of the standard of care and that in the further alternative, if there was a breach, she was the proximate cause of her own injuries. The trial judge went a little further and said Plaintiff assumed the risk in crossing the snowbank shifted the blame squarely on her as she was the "author of her own misfortune. An Authority cannot possibly say that trenches had been dug along the road for laying City drainage lines for the benefit of the populace when the work had been done in breach of basis safety measures. The 'core policy decision' cannot possibly transcend the basic safety measures.

The Canadian Supreme Court said "Core policy decisions are decisions as to a course or principle of action that are based on public policy considerations, such as economic, social and political factors, provided they are neither irrational nor taken in bad faith. Core policy decisions are immune from negligence liability because the legislative and executive branches have core institutional roles and competencies that must be protected from interference by the judiciary's private law oversight. A court must consider the extent to which a government decision was based on public policy considerations and the extent to which the considerations impact the rationale for core policy immunity. In addition, four factors emerge that help in assessing the nature of a government's decision: (1) the level and responsibilities of the decision-maker; (2) the process by which the decision was made; (3) the nature and extent of budgetary considerations; and (4) the extent to which the decision was based on objective criteria. The underlying rationale — protecting the legislative and executive branch's core institutional roles and competencies necessary for the separation of powers — serves as an overarching guiding principle for how to weigh the factors in the analysis. Thus, the nature of the decision along with the hallmarks and factors that inform its nature must be assessed in light of the purpose animating core policy immunity. But the mere presence of budgetary, financial, or resource implications does not determine whether a decision is core policy. Further, the fact that the word "policy" is found in a written document, or that a plan is labelled as "policy" may be misleading and is certainly not determinative of the question". The exclusion of the Core policy must be based on legislative criteria which such decision are shielded from judicial review. However the principles enumerated in the *Animinic v Foreign Compensation Commission* [11] would surface then as to the merits of the decision itself. Judiciary alone can be left to affirm the decisions of a public authority unless the decision is subjected to merits review. The Executive must come up with exclusions of judicial review of the decisions of an Authority if it

[10] *Nelson (City) v. Marchi*, 2021 SCC 41 (CanLII)

[11] *Anisminic v Foreign Compensation Commission* [1969] 2 AC 147; [1969] 1 All ER 208

infringes on liability towards the citizens and remedies for such decisions must also be made available as remedy for executive actions are pre-requisites in keeping with the requirements of human rights treaties etc.

Standard of Care in the U.S

In the United States, Federal Tort Claims Act - FTCA provides cover for individuals who are incapacitated, wounded or otherwise whose properties are damaged by the wrongful or negligent act of a government employee acting in the scope of his or her official duties may file a claim with the government for reimbursement for that injury or damage. However claims are entertained only if (1) he was injured or his property was damaged by a federal government employee; (2) the employee was acting within the scope of his official duties; (3) the employee was acting negligently or wrongfully; and (4) the negligent or wrongful act proximately caused the injury or damage of which he complains. The claimant must also provide documentation establishing that his claim satisfies all the elements of the FTCA.[12]

One classic definition of 'standard of care' for the 'tort of negligence' is amply demonstrated by Judge Learned Hand's oft quoted opinion in *U.S v Caroll Towing Co.*[13] The case arose as a result of sinking of a barge in 1944 in the Port of New York. The issue arose was whether Connors Marine Co which had tied together several of their barges at the pier off Manhattan. The defendants tug boat 'Carroll' removed one of the mooring lines connecting the barges to the peir. Then the remaining mooring lines broke, the barges sank. Since the barges had not been manned at the time, and evidence came to light that if a crew member had been on board, the barges could have been saved. The question that emerged for the Court was whether Connors was liable for failing to have its "bargee" remained on aboard.

Judge Learned Hand wrote that Connor's liability for the lost barge depended on: "It appears from the foregoing review that there is no general rule to determine when the absence of a bargee or other attendant will make the owner of the barge liable for injuries to other vessels if she breaks away from her moorings. However, in any cases where he would be so liable for injuries to others, obviously he must reduce his damages proportionately, if the injury is to his own barge. It becomes apparent why there can be no such general rule, when we consider the grounds for such a liability. Since there are occasions when every vessel will break from her moorings, and since, if she does, she becomes a menace to those about her; the owner's duty, as in other similar situations, to provide against resulting injuries is a function of three variables: (1) The probability that she will break away; (2) the gravity of the resulting injury, if she does; (3) the burden of adequate precautions. Possibly it serves to bring this notion into relief to state it in algebraic terms: if the probability be called P; the injury, L; and the burden, B; liability depends upon whether B is less than L multiplied by P: i. e., whether B › PL. Applied to the situation at bar, the likelihood that a barge will break from her fasts and the damage she will do, vary with the place and time; for example, if a storm threatens, the danger is greater; so it is, if she is in a crowded harbor where moored barges are constantly being shifted about. On the other hand, the barge must not be the bargee's prison, even though he lives aboard; he must go ashore at times. We need not say whether, even in such crowded waters as New York

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[12] United States House of Representatives https://www.house.gov/doing-business-with-the-house/leases/federal-tort-claims-act accessed 16 June 2022

[13] *U.S v Caroll Towing Co.* 159 F.2d 169 (2d Cir. 1947)

Harbor a bargee must be aboard at night at all; it may be that the custom is otherwise, as Ward, J., supposed in "The Kathryn B. Guinan," supra; and that, if so, the situation is one where custom should control".

Judge Posner's decisions in *U.S Fidelity and Guaranty Co v Plovidba* [14] U. S. Fidelity & Guaranty Co. v. Plovidba, critiqued the mathematical formula of Judge Hand. Posner J said

"Though mathematical in form, the Hand formula does not yield mathematically precise results in practice; that would require that B, P, and L all be quantified, which so far as we know has never been done in an actual lawsuit. Nevertheless, the formula is a valuable aid to clear thinking about the factors that are relevant to a judgment of negligence and about the relationship among those factors. It gives federal district courts in maritime cases, where the liability standard is a matter of federal rather than state law, a useful framework for evaluating proposed jury instructions, for deciding motions for directed verdict and for judgment notwithstanding the verdict, and, in nonjury cases, for preparing Rule 52(a) findings. (For a good example of the use of the Hand formula by a district judge in this circuit in preparing Rule 52(a) findings, see Chief Judge Robson's opinion in Ohio River Co. v. Continental Grain Co., 352 F. Supp. 505, 509 (N.D. Ill. 1972).) We do not want to force the district courts into a straitjacket, so we do not hold that they must use the Hand formula in all maritime negligence cases. We merely commend it to them as a useful tool-one we have found helpful in this case in evaluating the plaintiff's challenge to the jury instructions and its contention that negligence was shown as a matter of law"[15]

When it comes to public authorities they must ensure optimal level of care[16] to safe guard the uses of public authority's facilities. Could a citizen become careless knowing full well that Authority would ensure optimal level of care and become less serious about his behaviour? Lets take for an example, a children's park managed by the City should ensure that it is a safe place for the Children to engage in leisure activities. Should the City take into account possible scenarios children might venture into accidently? Should the parents or guardians be equally circumspect of the Children's behaviour? Should the children be left unattended all the time – impractical though? The equipment's in the leisure park must be operational and must be checked by the City for safety reasons. However the nature of the operations should have a 'heightened level of care' because of the nature of activities and behaviour expected from Children. Should the guardians and parents be made aware of the risks inherent before Children are admitted to the leisure park? This should be so with employees who are exposed to a heightened area of risk, of being harmed if a wrong move is made. This type of a scenario could be avoided if adequate precautions are taken and guidelines of use of facilities. In some industrial sites, safety training is mandatory and all employees irrespective of their blue collar of white collar all must undergo safety training and they are given a certificate of attendance after they have undergone the training. This would mitigate the level of liability by the employer. This has been a practice at the Dubai Drydocks LLC in UAE where all employees must undergone safety training. This paper has not looked into the sovereign immunity of the Government of UAE towards private

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[14] *United States Fidelity & Guaranty Company, Plaintiff-appellant, v. Jadranska Slobodna Plovidba*, Defendant-appellee, 683 F.2d 1022 (7th Cir. 1982)

[15] *Ibid*

[16] Economic Analysis of Alternative Standards of Liability in Accident Law

https://cyber.harvard.edu/bridge/LawEconomics/neg-liab.htm accessed 16 June 2022

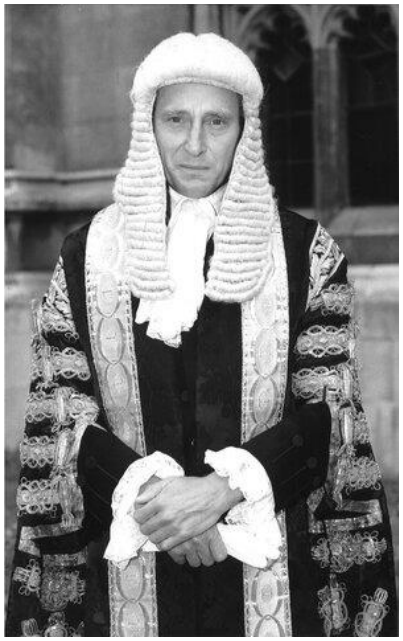
individuals who could challenge the government on tort liability whereas in the U.S sovereign immunity was abolished when it adopted the FTCA.

An interesting point has been raised by G. Michael Harz[17] that the U.S 'Congress has removed the federal government's cloak of sovereign immunity, thereby requiring the United States to account for its negligence.[18] He says the plain meaning of the Federal Tort Claims Act, FTCA along with common sense, require fault to be imposed on the United States in the same manner it is imposed on individuals. The federal government according to Harz, exists to serve the people.[19] Harz says 'the only way the government can serve in a fair and just manner is if it acts responsibly. [20]This does not mean it will always act correctly. People make mistakes. The government, being no more than an aggregate of people, will likewise err. In order to act responsibly, the government must accept the consequences of its inevitable errors. As our government realizes this and begins to accept responsibility for its acts, it will begin to better serve those who created it'.[21]

The Principles of the Doctrine of Duty of Care was espoused by Lord Atkin in the pivotal case of *Donoghue v Stevenson* in 1932.[1] Lord Atkins could not possibly have imagined the technological advances that we are enjoying now. He said then *"You must take reasonable care to avoid acts or omissions which you can reasonably foresee would be likely to injure your neighbor. Who, then, in law, is my neighbor? The answer seems to be – persons who are so closely and directly affected by my act that I ought reasonably to have them in contemplation as being so affected when I am directing my mind to the acts or omissions which are called in question."* Should the public authorities be more concerned about the vulnerable people in the society? Should the Government be held responsible if it fails to warn of an impending calamitous weather conditions or failure to clear road traffic so that an Ambulance or Police response vehicle could have made its way to help a patient or a victim of a crime? What standard of care should the government take to minimize the human suffering and property damage?

[17] G.Michael Harz, 'Liability of the United States Go Liability of the United States Government under the Federal Tort Claims Act', Denver University Law Review, p.618
[18] *Ibid,*
[19] *Ibid*
[20] *Ibid*
[21] *Ibid*

Legal Quotes - Lord Bingham QC On The Rule of Law.



The Rule of Law as defined by Lord Bingham,

They are that:

-the law must be accessible, intelligible, clear and predictable;

-questions of legal rights and liability should ordinarily be resolved by the exercise of the law rather than by discretion;

-laws should apply equally to all, except where differential treatment is justified objectively;

-Ministers and public officials must exercise the powers conferred reasonably, in good faith, fairly, within their powers and for the purposes for which they were conferred;

-the law must afford adequate protection of fundamental Human Rights;

-the State must provide a way of resolving disputes which the parties cannot themselves resolve;

-adjudicative procedures provided by the State should be fair;

-the State should comply with its international law obligations.

Legal quotes - Dominic Grieve, QC Former UK Attorney General emphasizes the prosecutor's role in making sure that trials are fair, politically neutral & human rights are defended

By observing these 8 principles of Lord Bingham, and in particular the fifth, affording adequate protection of fundamental human rights, we avoid the dilemma identified by Professor Joseph Raz in his 1979 work 'The Authority of Law'.

Professor Raz argued that, seemingly, within the framework of the rule of law, there can exist societies which oppress minorities, condone slavery, and support sexual inequalities - all of which would be abhorrent to liberal democracies. And yet, by adhering to strict legal structures and procedures such societies could still legitimately claim to excel in their conformity to the rule of law. Such a legal system will allow discrimination and prejudice but all the time within the legal construct of decrees and legislation. Absent protection for human rights, courts and legal system may deprive fellow citizens of their freedom, property and ultimately their very existence. In such circumstances, the claim that the rule of law is observed is but a mockery of the truth. It is troubling to see some countries publicly proclaim adherence to the Rule of Law and Human Rights, whilst at the same time eroding those very same standards behind the cover of legislative processes – providing a thin veneer of respectability and apparent conformity with legal norms.

It is all too easy for countries to develop a system of oppression and tyranny camouflaged by what purports to be a legal framework. Lord Bingham's principles and the call for respect for fundamental human rights, expose the lie of such systems and their flawed claim to act in compliance with the rule of law.As prosecutors and lawyers, we should therefore seek to observe and uphold each of Lord Bingham's principles; but for the purposes of today's plenary session, I wish to examine in a little more detail one specific principle, the seventh: the adjudicative procedures provided by the state should be fair.It is this principle which I believe is of particular relevance to the prosecutor and one whereby the prosecutor who observes it correctly will make a significant difference.

Absent a fair adjudicator (which includes the prosecutor) the rule of law will be banished, replaced by arbitrary and flawed justice. Without fairness there can be no confidence in the courts and decision makers.

SOURCE; https://www.gov.uk/government/speeches/the-rule-of-law-and-the-prosecutor

The Anglo-American LAWYER MAGAZINE

SPECIAL MESSAGE TO THE PRESIDENT OF THE UNITED STATES OF AMERICA JOE BIDEN

NATIONAL SECURITY OF CANADA, UK, NATO, ISRAEL, INDIA, JAPAN, SOUTH KOREA , AUSTRALIA AND NEW ZEALAND

Dear Mr. President,

The invention of hypersonic missiles by the perceived enemies of the United States would be a huge national security concern. The speed with which they are delivered will wreak havoc resulting in breaking the constitutional order of the United States which it had cherished for two centuries. The attack on the U.S. satellite communication facilities in space could be the first strike option against the U.S. It could cut off the President of the U.S from the nation, from the military commanders and the civil government as a result you will not be able to communicate with U.S allies viz., Canada, UK, Europe/ NATO, Israel, Japan, India, Japan, South Korea, Australia, New Zealand, and elsewhere. Your position as Commander-In-Chief of the U.S forces would be meaningless if you are unable to communicate with the nation. The key allies of the U.S., would lose confidence in your ability to wage a coordinated battle against the perceived enemies. The authoritarian regimes in the World would feel triumphant and forge new strategic alliances. We, KC – The Anglo-American Lawyer Magazine, call upon you to immediately appoint a Presidential Commission to inquire into the efficacy of the U.S constitution and whether it should be suitably revised or amended to deal with the new threats. Could there be 'a standby constitution'. This will ensure that the security of the strategic allies of the U.S too is guaranteed in case such an eventuality takes place.

God Bless America

OVER TO YOU MR. PRESIDENT

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